No. 11405

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

PAUL A. PORTER, Administrator,
Office of Price Administration,
Appellant,

vs.

PAUL MYERS,
Appellee.

Appellee's Brief

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TABLE OF CASES AND AUTHORITIES CITED

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STATEMENT OF THE CASE

Appellee-defendant respectfully designates to the Court three matters in which the appellant's statement of the case is not wholly accurate or omits matters which appellee believes are material to a decision of the case.

1. By stipulation in the court below the parties agreed that the regulations governing pricing of the commodity sold by defendant was Section 1499.3, as

shown by 7 F. R. 3153. This section appellee sets out in the appendix hereto as being the correct version of this section. Through error or oversight the appellant, in his brief, on page 31, sets out a later revision of this section.

2. Appellee calls to the Court's attention the language of the stipulation made by the parties in the court below, which was, as it is designated, "Stipulation for Judgment." (Tr., p. 10.) In paragraph 9 of the stipulation the language is "the plaintiff has made no allowance for return freight to the brewery on empty cases and bottles or brokerage commissions or finder's fees *paid by said defendant.*"

The Court's attention is also called to paragraphs 11, 12 and 13 of the stipulation, whereby the parties agreed to a certain stipulated sum to be entered as a judgment against the defendant in the event of a decision by the court upon the facts stipulated.

3. Appellee further calls the Court's attention to Exhibits "A" and "B", attached to the stipulation (Tr., pp. 19, 21) wherein on September 14, 1945, the Office of Price Administration specifically approved of defendant's method of pricing his merchandise and advised defendant that this approval was "the official interpretation."

ARGUMENT

(In the argument made here appellant is referred to as plaintiff and the appellee is referred to as defendant.)

1. In determining his maximum selling price under Maximum Price Regulation No. 259 could defendant include as an item of his cost freight paid on empty cases and containers which the defendant had to return to the breweries in order to purchase the beer?

2. In determining his maximum selling price under Maximum Price Regulation No. 259, could defendant include as an item of his cost the broker's or finder's fee paid by him to purchase the beer?

THE REGULATIONS

The determination of these questions will depend entirely upon the interpretation which the Court gives to Section 1499.3(a) of General Maximum Price Regulation (7 FR 3153). It is stipulated that said section sets forth the proper method for computing the maximum price which defendant was entitled to charge on the brands of beer involved in these questions. See Section 6 of the Stipulation.

The authority for price control stems from the Emergency Price Control Act of 1942. The act created the Office of Price Administration and provided for the appointment of an administrator. Section 2(a) of such act provides in part that

"Sec. 2(a). Whenever in the judgment of the Price Administrator (provided for in section 201 (21)) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . . PROVIDED, *That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.*" . . . (Emphasis ours.)

U. S. Code Congressional Service 1944. Page 617.

As stipulated in paragraphs 5 and 6 of the Stipulation the following provisions of the regulations promulgated under the authority of the Emergency Price Control Act of 1942 govern the maximum price the defendant was entitled to charge for the beer involved in this case:

"(a) *For manufacturers and wholesalers.* The maximum price which a manufacturer or wholesaler may charge for a domestic malt beverage, except in 32-ounce containers, shall be the highest price charged by him for such domestic malt beverage during the period October 1 to 15, 1941, inclusive, plus the 'permitted increase' set forth in the schedule of permitted increases in paragraph (c) (1) of this section, or the maximum price now established by such manufacturer or wholesaler

under the pricing provisions of the General Maximum Price Regulation, plus the 'permitted increase' for excise taxes only as specified in paragraph (c) (2) of this section."

Section 1420.66 Appendix A(a) Maximum Price Regulation, issued November 2, 1942;

and Section 1499.3(a), the specific provision under which defendant was obligated to price the beer, as agreed by paragraph 6 of the Stipulation states:

"Sec. 1499.3. Maximum prices for commodities which cannot be priced under section 1499.2. The seller's maximum price for a commodity which cannot be priced under section 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

"(a) Sales at wholesale or retail. In the case of a sale at wholesale or retail, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 1499.2 of this General Maximum Price Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained by *the cost to him of the commodity being priced under this paragraph.* The resulting figure shall be the maximum

price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of Price Administration upon a form, duly filled out and signed under oath or affirmation, copied from the form contained in section 1499.24, Appendix A, of this General Maximum Price Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration. (Emphasis ours.)

U. S. Code Congressional Service 1942. Page 377; 7 Federal Register 3135.

FREIGHT PAID ON RETURNED EMPTIES

Was the freight which defendant was compelled to pay on empties returned to the breweries an item of cost to him of the beer to be priced within the meaning of Section 1499.3(a) General Maximum Price Regulation?

The only proper guides for determining this query are the provisions of the quoted regulations. The question would seem to answer itself. It must be admitted that the beer could not have been purchased unless defendant, as the buyer, would pay such freight costs of returned empties. It is further true that never theretofore had the defendant in the conduct of his business assumed and absorbed the cost of return freight on empties. This regulation uses the words "the cost to him" without any qualifying language. The interpretation which the defendant gave the last

quoted section is not only sound but it was also the method approved by the regional office of the Office of Price Administration as late as September 14, 1944. Exhibit "A" of the Stipulation (Tr. 19) shows that defendant had an official ruling as late as September 14, 1944, which stated that the unit replacement cost of beer could include "freight on the return of empty bottles to the brewery." Defendant was told on September 14, 1944, that the correct method of pricing the beer was as follows:

> "1. The comparable commodity you are using is, I believe, ABC Beer. Take your maximum price under OPA regulations for that beer.
>
> "2. Divide this price by the net unit replacement cost of ABC Beer.
>
> "3. Multiply the percentage so obtained by your net unit cost of Capitol Beer or the beer being priced. This unit replacement cost may include the cost of Capitol Beer at the brewery, the loading charge at the brewery, freight on full cases and *freight on the return of the empty bottles to the brewery.*" (Emphasis ours.)

and he was further told that such letter could be considered an official interpretation. (Tr. 20.) See Exhibit "A" of the Stipulation.

This ruling was made several weeks after the last sale which plaintiff claims exceeded the selling price, because paragraph 4 of the Stipulation shows that the sales which are now questioned were all made on or prior to August 26, 1944.

We, therefore, have the unusual situation where the Administrator of the Office of Price Administration is seeking to penalize the defendant for doing what the local and regional offices of the OPA and the attorneys for OPA held to be a proper and legal practice at the time the beer was priced and the sales made by defendant.

It is further true that the later adverse ruling from Washington, referred to in Exhibit "B" of the Stipulation, is not stated to be based upon any provision of law, published rule or regulation, but merely asserts what some individual in Washington thought to be more in harmony with the aim of price control than the method adopted by defendant.

It is also noteworthy that *following* the letter of September 29, 1944, Exhibit "B" of the Stipulation, the Office of Price Administration promulgated a specific regulation permitting the inclusion of charges for the return of cases and empty containers under situations such as those existing in the instant case.

> "(p) Transportation charges. . . .
>
> "The term 'transportation charges' shall also include charges for the return of cases and empty containers, only where the seller imposed such a charge on a particular class of purchaser during the applicable base period *or where the seller did not ship outside his local area during the applicable base period and now establishes* a maximum price to a new class of purchaser located outside his local area. Such charges shall be at the rate

charged by the cheapest available common or contract carrier customarily used for movement of the cases and containers from the above mentioned purchaser's customary receiving point to the seller's shipping point from which the malt beverage was originally shipped." (Emphasis ours.)

Paragraph (p) of Section 1.2 Amendment 3, Maximum Price Regulation No. 259.

It seems strange indeed that those charged with the enforcement of price control should be urging this Court to impose a further penalty upon the defendant in this action for doing what they themselves thought to be the proper practice until the receipt of contrary advice from Washington in September, 1944. This is the more unusual because of the fact that one has to torture the language of the published regulations to hold that the words "cost to him" contained in the section governing the price of beer did not include the cost of return freight, when, as in this case, the payment of such return freight was a prerequisite to the purchase of the beer being priced.

The unreasonableness of plaintiff's contention is further disclosed when it is borne in mind that the amount involved in this item of return freight, which the plaintiff is seeking to recover from the defendant, was paid out by the defendant to the carriers and the inclusion of such items in the price of the beer did not result in a profit to the defendant.

The failure to properly clarify the regulations, if there was any ambiguity in such regulations, which

point defendant disputes, was the fault of the Office of Price Administration, and if it promulgated and published a regulation which was so vague and uncertain that it was misinterpreted by the regional and local administrators and attorneys, there is no legal basis for the recovery of damages against the defendant, who adopted the same interpretation given the regulation as the local and regional administrators.

The defendant asserts the facts to be that nowhere did any law or published regulation say that return freight under the circumstances in this case was not a proper item of cost to defendant. We cannot find any published regulation or rule which holds that it was improper during the period up to August 25, 1944, to include return freight in computing the maximum price under the General Maximum Price Regulation. Indeed the only evidence we have found that anyone contended that such charges were improper are contained in the letter, Exhibit "B" of the Stipulation, and the claim made by the filing of this action. We do know that the return freight was an actual item of cost to defendant and that the Office of Price Administration has been told by Congress that none of its regulations or orders should "contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods."

It would seem that the bureaucrat who ruled return freight an improper item of cost in cases such as presented here was unfamiliar with established accounting methods and sought to interpret the regulation to suit

his theories of price control rather than in accordance with reason and the wording of the regulation. Undoubtedly the injustice of such interpretation resulted in the adoption of the specific provision which now permits allowance for return freight.

We think there is no just basis, even under a strict interpretation of the law and regulations for denying defendant's right to return freight on empty cases and containers as an item of cost to him.

COMMISSIONS PAID TO BROKERS

Was defendant entitled, under Section 1499.3(a) General Maximum Price Regulation, to include as an item of cost to him brokerage fees which he had to pay to purchase certain beer?

As previously stated, defendant, during 1944, purchased certain stocks of beer through the medium of brokers and such brokers charged defendant fifteen cents per case as a brokerage or finder's fee.

Plaintiff is seeking to recover from defendant something in excess of $4,000, based upon his contention that defendant had no right to charge such brokerage fee as an item of cost in computing his maximum selling price under General Maximum Price Regulation for the beer so purchased.

Counsel for defendant are unable to determine the exact basis for this contention because they have been unable to find any regulation or order in effect between

December, 1943, and August 26, 1944, prohibiting the inclusion of such item.

It would appear that OPA takes the position that notwithstanding its published regulations and the meaning ordinarily conveyed by such regulation, it has the right to place the interpretation upon its regulations which it deems best suited to effect the control of prices and that such interpretations, like the regulations, should have the force and effect of law.

We differ basically with this holding. Any such view, we believe, has no support in law. The Price Stabilization Act of 1942 and the regulations and orders promulgated under the act do not attempt to prohibit things which are "*malum in se.*" The prohibitions which the administrator may enforce under the law cover acts which are not immoral or iniquitous in themselves. Certainly the prohibitions set up by the OPA can extend no further than the reasonable intendment of the language used in its published regulations. The defendant should not be penalized because of the stabilization theories held by some of those charged with the administration of the law. If we are to be ruled by executive decrees, certainly the minimum protection which the public can expect is that the decrees be definite and certain and not susceptible to one interpretation by the official holding one set of economic theories and subject to some different interpretation if any particular administrator thinks some other procedure will best effect the purposes of price control.

In short, despite OPA the merchant may still operate as traders have always operated unless the contemplated transaction is expressly prohibited. Applying such test to the inclusion of brokerage as an item of cost to the defendant we can find no regulation or order which prohibits its inclusion.

What was defendant's guiding principle? Maximum Price Regulation No. 259 said he was to price the beer under the rule laid down in Section 1499.3(a) of General Maximum Price Regulation. Paragraph 6 of the Stipulation shows that there can be no question on this score. Nowhere in Section 1499.3(a) nor in the General Maximum Price Regulation was there any prohibition against the inclusion of brokerage, and assuredly under any theory of accounting or business practice it was a proper item of cost.

By Section 5.3 of the General Maximum Price Regulation No. 259, dated December 18, 1944, the payment of brokerage was thereafter expressly prohibited, in the following language:

> "Sec. 5.3. Payment of brokerage. Every broker shall be considered the agent of the seller, and not the agent of the purchaser. In each instance, the amount paid by the purchaser to the seller, plus any amount paid by the purchaser to the broker, shall not exceed the seller's maximum price including allowable charges actually paid by the seller or by the broker. In other words, the seller may not collect from the purchaser any more than the maximum price including allowable charges, less any amount the purchaser pays the broker.

> "Note: Attention is directed to Revised Maximum Price Regulation 165 establishing maximum prices brokers may charge for their services."

However, this order was issued some months after the last sale involved in this action.

If, as plaintiff contends, the payment of brokerage was prohibited prior to the adoption of Section 5.3 of General Maximum Price Regulation No. 259, this last section would seem to have been wholly unnecessary. The facts are, however, that there was no specific prohibition against the payment of brokerage prior to December 18, 1944, although some administrative official of OPA may have interpreted the regulation to mean that the payment of brokerage in cases of this kind was contrary to the policy of the act. Any such ruling, however, was never brought to the attention of this defendant and was never published in form so as to charge defendant with notice of the ruling or to give it the force and effect of law.

That the inclusion of brokerage fees was not improper prior to December 18, 1944, the date of Revised Maximum Price Regulation No. 259, is shown, it seems to us, by the following language contained in "Statement of the Considerations Involved in the Issuance of Revised Maximum Price Regulation 259," which says:

> "The new regulation contains provisions designed to prevent use of brokers to shift to purchasers selling expenses which the seller's maximum price is designed to cover."

If the payment of brokerage had been prohibited by any existing regulation it is obvious this language would not have been used in the statement of considerations for the issuance of the regulation prohibiting the payment of brokerage.

We repeat that it is not sufficient for some administrative official to determine that a departure from ordinary business principles will further price stabilization. To prohibit any practice which was legitimate prior to price control it is essential that a regulation specifically prohibiting the action be legally adopted and published in the Federal Register.

We do not argue this principal at length or cite authority because this Court has heretofore held such adoption and publication to be a prerequisite to the validity of such an executive order.

Here again the plaintiff is not seeking to strip defendant of a profit which resulted to him from the alleged overcharge (because no profit resulted), but on the contrary is seeking to take away from defendant an amount which defendant has paid to the brokers.

We wish to stress the further point that since neither the wishes and desires of the officials of OPA, nor any purported interpretation of their own rulings can bind defendant unless such orders have been incorporated in a legally adopted regulation published in the Federal Register. Neither should any subsequent interpretation or contention made by OPA officials of their own regulations have any persuasive

effect with the Court in determining this case, but the Court should interpret any pertinent regulation by the same aids which were afforded the defendant, to wit: the meaning ordinarily conveyed by the language of the regulations. Certainly if the language of the regulations was susceptible of an interpretation under which the charges made by defendant were permissible, then defendant is not to be penalized because of another possible interpretation of the regulation. Nor is there any rule of law, which under such circumstances, says the defendant was obligated to adopt the most unfavorable interpretation under peril that he might be held liable for an overcharge if some official of OPA ruled the unfavorable interpretation more consistent with the overall purpose of the act.

APPELLANT'S BRIEF

In these portions of appellee's brief it is the intention to answer certain portions of appellant's brief covering matters not previously argued herein.

(1) On page 11 of appellant's brief appellant makes reference to Section 5.9(b)(1) concerning "Evasions." It is apparent that this provision relates to evasions only and leaves unanswered the question of what items could properly be included in defendant's maximum price. Obviously, if defendant based his charges, as permitted by Section 1499.5 of General Maximum Price Regulation, 7 F. R. 3153, there was no evasion. The appellee submits that this provision

relates only to evasions resulting from changing established maximum prices and does not purport to relate to the method of fixing the price in the first instance. Assume, for the sake of illustration, that a wholesaler selling beer in 1942 then bought beer at a price per case laid down at his warehouse and paid no separate charge for incoming freight. Admittedly under such a state of fact the wholesaler could not charge, after the inception of the act and regulations, a greater price than the price which he had theretofore charged for the beer so delivered to and sold by him. But if, after inception of the act, he desired to buy and did buy beer from some other brewer, which beer was billed to him f. o. b. the brewery, under plaintiff's contention such wholesaler, in establishing his maximum price under Section 1499.3 for beer first handled after the act, would not be entitled to add such incoming freight as an item of his cost because he had not paid a separate charge for freight prior to the act. The contention that such incoming freight was not a part of the "cost to him of the commodity being priced under this paragraph" would be just as logical as the plaintiff's contention in the instant case, because the wholesaler would have paid no separate transportation charges upon his comparable commodity prior to the enactment of the act. Certainly the words "cost to him of the commodity being priced under this paragraph" (1499.3 GMPR), mean just what they say and are to be interpreted under established accounting methods.

(2) On pages 16 through 25 the appellant makes a vigorous attack upon the reasons given by the trial court for its decision. The gist of this attack is that the trial court was without evidence to support its conclusions of law. On this point appellee submits that the following points should be considered:

(a) In the absence of specifications of error the appellate court cannot consider the sufficiency of evidence to support findings of fact.

Gartner v. Hays, et al., 272 Fed. 896.

The appellant cannot, under the well-recognized rule of appeal and error, specify that the court erred in concluding certain matters as a matter of law and then argue the court erred in making certain findings of fact. Obviously the argument of appellant that "defendant adduced no proof whatever" and "this record will be searched from end to end in vain for any semblance of any proof," must be disregarded by this court as being argument upon points not raised in this appeal.

(b) The parties in their stipulation stated that as to the amounts claimed by defendant as legitimate costs "the plaintiff has made no allowance for return freight to the brewery on empty cases and bottles or brokerage commissions or finder's fees *paid by said defendant.*" (Tr. 13.) The only reasonable inference from this stipulation is that the defendant did actually pay these costs.

In *Clyde Equipment Company vs. Fronto,* 16 Fed. (2nd) 106 (C. C. A. 9th) it was held that if a finding

of fact is susceptible of two constructions, one of which supports the judgment and the other does not, the former will prevail and whenever from the facts found other facts may be inferred which will support the judgment such inferences will be deemed to have been drawn.

Certainly, if this is true of findings of fact made upon a trial of a case, it must be equally true of findings of fact made upon stipulation. Appellee submits that the only reasonable inference to be raised is the inference which supports the court's judgment below, namely, that the defendant did pay these charges.

3. Appellant, on page 17 of its brief, refers to a presumption that a condition which has been shown to exist, has continued. Upon this presumption appellants asks that this Court should assume that the new supplier absorbed ordinary freight charges and brokerage commissions as the former supplier had previously absorbed such charges. It is obvious this presumption would not operate since new conditions had intervened. New suppliers were selling to the defendant and new price structures had intervened.

However, if appellant is reduced to the point of quoting "presumptions," appellee counters with a presumption of much greater validity, that is, the presumption that the law is being obeyed. It has been specifically held by federal courts that it cannot be assumed, merely because the contrary has not been established by proof, that an individual or a corporation has conducted its affairs in violation of law.

Railroad v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022;

Railway Express v. Lindenburg, 260 U. S. 584, 43 S. Ct. 206, 67 L. Ed. 414;

Railway v. Stewart, 245 U. S. 362, 62 L. Ed. 347, 38 S. Ct. 130;

Kirby v. U. S., 273 Fed. 391 (C. C. A. 9th);

Packing Company v. Steamship Company, 22 Fed. (2nd) 12 (C. C. A. 9th).

Appellee therefore submits that the trial court merely rendered judgment based upon the presumption that defendant's supplier was making legitimate charges for the merchandise furnished to the defendant. No proof was necessary upon this point and no inference arises from lack of such proof that the charges were illegal or unauthorized by the OPA.

4. Finally it is submitted that the appellant cannot in good faith question the stipulation, which was the result of uncoerced exercise of discretion by both parties in the trial court. The parties expressly stipulated, in paragraphs 11, 12 and 13, that judgment in a certain sum should be rendered under certain circumstances. Certainly this court cannot now order that a different judgment should be entered because the court below did not make findings of fact which were not within the terms of the stipulation.

There is a serious question whether an appeal lies from a case which has been submitted by the parties on stipulation.

"The principal established is that, when the parties have agreed that a certain judgment shall be rendered for either of them, according to the opinion of the judges, on a case stated, the Court of Errors cannot rescind that agreement and enter a different judgment. It is the same in principle as if they had agreed that judgment should be entered according to the opinion of any other individuals; or that it should depend on any other collateral event. When the opinion is given, or the other event happens, and the judgment is entered accordingly, it is so entered by the consent and agreement of the parties, in like manner as if they had in any other mode ascertained what was right and just between them, and had afterwards come into court and consented to a judgment accordingly."

Wellington v. Stratton, 11 Mass. 394, 395, 3 C. J. 610.

A case supporting this view is *Pickney v. Railroad,* 109 Atl. 700 (Cert. den.) 245 U. S. 631, 65 L. Ed. 447, 41 S. Ct. 7. It appears, however, that *U. S. v. Eliason,* 16 Peters 291, 10 L. Ed. 968, has probably settled this question in favor of the appellant here. Nevertheless, it is submitted that the stipulation below must be construed most strictly in favor of the defendant. It is submitted that appellant cannot be heard to say that the stipulation did not contain facts or reasonable inferences therefrom sufficient to support the judgment of the court below.

CONCLUSION

It is respectfully submitted that the decision of the trial court was correct and should be affirmed.

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Appendix

APPENDIX

"Sec. 1499.3. Maximum prices for commodities which cannot be priced under section 1499.2. The seller's maximum price for a commodity which cannot be priced under section 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

"(a) Sales at wholesale or retail. In the case of a sale at wholesale or retail, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 1499.2 of this General Maximum Price Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained by *the cost to him of the commodity being priced under this paragraph.* The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of Price Administration upon a form, duly filled out and

signed under oath or affirmation, copied from the form contained in section 1499.24, Appendix A, of this General Maximum Price Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration." (Emphasis ours.)

7 F. R. 3153.